



California Fair Political Practices Commission

September 24, 1987

Susan M. Schectman
City Attorney
City Hall
170 Santa Maria Avenue
Pacifica, CA 94044

Re: Your Request for Advice
Our File No. A-87-226

Dear Ms. Schectman:

You have requested advice on behalf of three members of the Pacifica City Council, Ginny Jaquith, Charles Curry and Fred Howard, concerning their duties under the conflict of interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTION

A lawsuit concerning denial of a use permit has been filed against the City of Pacifica, naming Councilmembers Jaquith, Curry and Howard as additional defendants. Are the three councilmembers disqualified from participating in decisions concerning their requests for the city to defend them in a lawsuit and to pay any resulting judgment for general or special damages against them?

CONCLUSION

Councilmembers Jaquith, Curry and Howard may participate in decisions concerning their requests for the city to defend them in a lawsuit and to pay any resulting judgment for general or special damages against them. These decisions concern the councilmembers' compensation or terms and conditions of office; therefore, the decisions do not create a conflict-of-interest situation for the councilmembers.

FACTS

A lawsuit has been filed against the City of Pacifica, naming Councilmembers Jaquith, Curry and Howard as additional

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

defendants. The councilmembers are sued in both their individual and official capacities.

The suit concerns the city's denial of a use permit for a business. The complaint contains four causes of action and seeks unspecified general and special damages and \$500,000 in punitive damages.

The three councilmember defendants wish to request the City of Pacifica to defend them in this action and to pay any judgment based thereon.

ANALYSIS

An officer or employee of a public entity may request the public entity to defend him or her against claims arising within the scope of his or her employment and to pay any judgment arising from such a claim. (Section 825.) If an officer or employee requests in writing that the public entity provide a defense, the public entity is required to inform him or her whether it will provide a defense. (Section 995.2.) The public entity also has authority to pay a judgment for punitive damages against the affected officer or employee if the governing body of the entity makes certain findings, including that the judgement is based on an action by the officer or employee within the scope of employment and in good faith, without actual malice and in the apparent best interests of the public entity. (Section 825(b).)

The Political Reform Act prohibits public officials from making, participating in making, or using their official positions to influence the making of any decision in which they have a financial interest. (Section 87100.) An official has a financial interest in a decision if it will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on the official or any member of the official's immediate family. (Section 87103.) Thus, an official may not act where

[i]t is reasonably foreseeable that the personal expenses, income, assets, or liabilities of the official or his or her immediate family will be increased or decreased by at least \$250 by the decision....

Regulation 18702.1(a)(4) (copy enclosed).

The decision facing the Pacifica City Council is whether the city should defend the three councilmembers in the lawsuit and, potentially, whether to pay any resulting judgment against them. If the city does defend the councilmembers and/or agrees to pay a judgment, the councilmembers would avoid the costs of hiring legal counsel and/or potential liability for damages.

Under the Act, a conflict of interest exists only if a governmental decision foreseeably and materially affects an official or his or her private economic interests. For example, the Act's definition of "income" excludes:

... Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency....

Section 82030(b)(2).

Thus, the decision in question does not affect the councilmembers' "income," as that term is defined in the Act. However, it does foreseeably affect the councilmembers insofar as it affects their personal expenses and liabilities. Consequently, we must determine whether some other exclusion applies to these circumstances.

The statutory scheme for legal defense of, and payment of judgments against, public officers and employees assures the zealous execution of their official duties.

The public employee need not suffer concern over the possibility that he will be compelled to finance and oversee a tort suit filed against him personally; the statute provides for defense by the public entity upon notice, and the employee's best interests clearly favor the giving of such notice. Moreover, the public employee faces only a slim danger of ultimate personal liability; such liability attaches only in the rare instances of injuries arising from acts either outside the scope of employment or performed with actual fraud, corruption, or malice. Indeed, a principal purpose of the indemnification scheme laid out in Government Code sections 825 and 825.6, limiting the personal threat of suit or liability, centered on assuring the zealous execution of official duties by public employees. To the extent that the ardor of public employees might be affected by the threat of

personal liability, these fears will be allayed by the indemnification provisions.

Johnson v. State of California
(1968) 69 Cal. 2d 782, 791-792
(footnotes omitted).

The payment of these expenses for public officials and employees is a term or condition of their office or employment. For example, local public agency employees may alter the legal defense and indemnification provisions of Section 825 by means of a collective bargaining agreement. This applies to indemnification for general and special damages, but not to indemnification for punitive damages. (See Section 825(c) and (d).) Because payment of legal defense expenses and judgments for general and special damages are subject to collective bargaining, they are considered terms or conditions of employment. (See Section 3504.)

By regulation, the Commission has determined to exclude such decisions from the requirement of disqualification. Two regulations apply in this regard. They read, in pertinent part:

(d) Making or participating in the making of a government decision shall not include: ...

(3) Actions by public officials, employees, or employee representatives relating to their compensation or the terms or conditions of their employment or contract.

Regulation 18700(d)(3) (copy enclosed).

(b) ... an official is not attempting to use his or her official position to influence a governmental decision of an agency ... if the official: ...

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

Regulation 18700.1(b)(3) (copy enclosed).

The Commission has determined that it is necessary that public officials be permitted to make and participate in making decisions affecting their own compensation and

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the terms and conditions of their own employment or contract. In the case of the city council, they are ultimately accountable as elected officials to the voters if dissatisfaction arises over the level of their compensation, and the terms and conditions of their office. This would include their liability for legal defense and potential judgments for general and special damages which may result from claims arising within the scope of their official duties.

Your letter includes a question regarding the councilmembers' participation in a decision concerning the city's payment of a judgment for punitive damages against them. According to the facts in your letter, no judgment for punitive damages against any councilmember has been awarded. Section 825(b) authorizes the city's payment of a judgment for punitive damages only if the judgment is based on certain factors. In the absence of a judgment for punitive damages, the city council cannot make the necessary findings required by Section 825(b). Thus, it appears that a request for analysis of a decision to pay such a judgment is premature and hypothetical.

We decline to answer your hypothetical question at this time. (See Regulation 18329(b)(8)(D), copy enclosed.) If a judgment for punitive damages is awarded against the councilmembers, it then would be appropriate for us to consider whether they may participate in a decision authorizing the city to pay that portion of the judgment.

The issues raised in the question of payment of punitive damages have not previously been addressed by the Commission. They include complex policy decisions which are best addressed in a specific factual situation, rather than in the abstract. If punitive damages are awarded, a Commission opinion may be the best vehicle for resolving those substantial questions of interpretation.

If punitive damages are awarded, you should contact us for further guidance. In the meantime, Councilmembers Jaquith, Curry and Howard may participate in decisions concerning the city's legal defense and payment of general and special damages on their behalf.

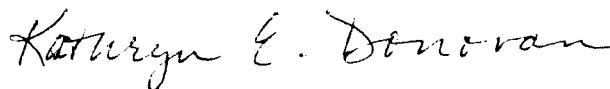
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In your letter, you also asked whether we are aware of separate, common law rules concerning application of the "rule of necessity" which may differ from the "rule of legally required participation" in the Act. (Section 87101; Regulation 18703.) Enclosed are copies of In re Hudson (1978) 4 FPPC Ops. 13, and In re Brown (1978) 4 FPPC Ops. 19, which discuss some court decisions concerning the common law "rule of necessity."

Please contact me at (916) 322-5901 if you have any further questions regarding this matter.

Sincerely,

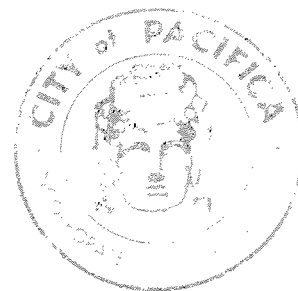
Diane M. Griffiths
General Counsel

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh
Enclosures

CITY HALL 170 SANTA MARIA AVENUE PACIFICA, CALIFORNIA 94044



Seal of Pacifica

CITY ATTORNEY
Susan M. Schmittman
(415) 875-7307

MAYOR
Galenous

MAYOR PRO TEM
Ginny Silver Jaquith

COUNCIL
Charles O.B. Curry
John Laeb
Fred Howard

August 13, 1987

Fair Political Practices Commission
Legal Division
P. O. Box 807
Sacramento CA 95814

Re: Request for Advice Letter

Dear Sir or Madam:

Please provide me with an Advice Letter regarding a potential conflict of interest concerning three of the five City of Pacifica Councilmembers. The affected Councilmembers, Ginny Jaquith, Charles Curry and Fred Howard, have authorized me to seek a written opinion from your agency. The following is a summary of the facts and the questions presented:

A lawsuit has been filed against the City of Pacifica which names these three Councilmembers as additional defendants. The Councilmembers are sued in both their individual and official capacities.

The suit concerns the City's denial of a use permit for a business. The complaint contains four causes of action. The first cause of action is for a writ of administrative mandamus ordering the City to set aside its decision regarding the permit. The second cause of action is for violation of civil rights (42 U.S.C. §1983) for denial of due process and deprivation of property without just compensation. The third cause of action is for conspiracy (42 U.S.C. §1985) to deprive the petitioners of due process and just compensation. The fourth cause of action is for declaratory and injunctive relief, seeking a vested right to conduct the petitioner's business and a declaration of the petitioner's rights under the City's ordinances. The complaint seeks unspecified general and special damages and punitive damages in an amount of \$500,000.00.

The three Councilmember defendants wish to request that the City of Pacifica defend them in this action and pay any judgment based thereon. Government code §825 provides that an employee¹ may request a public entity to defend him/her against claims arising within the scope of his/her employment and that the entity must pay any such judgment. Government Code §995.2 provides that, if an employee requests in writing that the public entity

¹ The definition of "employee" in the California Government Tort Claims Act includes an "officer" such as a Councilmember. See Government Code §810.2.

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provide a defense, the public entity shall inform the employee whether it will provide a defense. Government Code §825(b) authorizes a public entity to pay any judgment for punitive damages against the affected employee if the governing body of the public entity makes certain findings.

Thus, this statutory scheme for payment of judgments against officials may require the City Council to make a determination about whether to provide a defense to these three Councilmembers and, potentially, whether to pay that part of a judgment involving punitive damages.

A potential conflict of interest may exist in these Councilmembers deciding whether the City should provide a defense for them, since it may be anticipated that such a decision could affect the Councilmembers' personal assets by at least \$250.00. 2 Cal. Admin. Code §18702.1(a)(4). However, since a quorum of Councilmembers are named in the suit, the City Council could not lawfully make such a decision if the three affected members disqualify themselves. It appears that the "rule of necessity" may apply.

Please provide me with a Letter Opinion concerning the proper procedures for the City Council to follow in making decisions regarding providing a defense and paying judgments for these three Councilmembers in this situation. Please indicate whether you are aware of separate, common law rules concerning the application of the "rule of necessity" which may differ from FPPC regulations, as suggested in your latest "Guide to the Political Reform Act for Public Officials."

Thank you very much for your assistance. If you require any further information to respond to this request, I would be happy to furnish it.

Very truly yours,



SUSAN M. SCHECTMAN
City Attorney

SMS:jh

cc: Mayor Galehouse and Councilmembers
Daniel V. Pincetich, City Manager



California Fair Political Practices Commission

August 14, 1987

Susan M. Schectman
City Attorney
City Hall
170 Santa Maria Avenue
Pacifica, CA 94044

Re: 87-226

Dear Ms. Schectman:

Your letter requesting advice under the Political Reform Act was received on August 14, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn Donovan, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Adm. Code Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
General Counsel

DMG:plh

cc: Councilmember Ginny Jaquith
Councilmember Charles Curry
Councilmember Fred Howard

Memorandum

To : File No. A-87-226

Date : October 1, 1987

From : FAIR POLITICAL PRACTICES COMMISSION
Kathy Donovan

Subject: Extension of 21-Working Day Deadline

On September 16, 1987, I contacted Susan Schectman and received an extension until September 24 for this letter. Bob Leidigh contacted Ms. Schectman's office and was informed that they agreed to give us additional time, if necessary.

KED:jaj